IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 09-0487

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VALERIE EMMERSON,

Petitioner and Appellant,

v.

WALLACE C. WALKER and RANA RAE WALKER,

Respondents and Appellees.

WALLACE C. WALKER and RANA RAE WALKER,

Third-Party Plaintiffs, Appellees, and Cross-Appellants

v.

S. TUCKER JOHNSON,

Third-Party Defendant and Appellant

On appeal from:

Montana Sixth Judicial District Court, Sweet Grass County
Hon. Wm. Nels Swandal, District Judge
Cause No. DV 2007-8

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STATEMENT OF THE ISSUES

1. Whether Johnson is prohibited from presenting for the first time on appeal legal theories and arguments that he did not raise in the district court?

2. Whether the district court correctly found that Johnson tortiously interfered with the Walker/Emmerson exchange when he, among other things, induced Emmerson to breach her agreement, depriving Walkers of the benefit of their bargain?

3. Whether the district court was correct in determining the award of attorney fees due Walkers from Emmerson?

4. Whether the district court erred in refusing to consider Walkers' claim against Johnson for punitive damages?

STATEMENT OF THE CASE

This case arises out of a contract for the exchange of real estate between Wallace ("Ace") and Rana Rae ("Rae") Walker, husband and wife, and Valerie Emmerson. The case on appeal centers around the conduct of a third party, Tucker Johnson, conduct which was intended to induce Emmerson's breach of the exchange agreement and deprive Walkers the benefit of their bargain.

The Emmerson/Walker Land Exchange Agreement was signed on May 15, 2006. It contemplated that Emmerson would convey 480 acres of her property to Walkers, and Walkers would convey Emmerson their "East Fork" property consisting of 739 acres. Both properties are located in Sweet Grass County. The exchange was conditioned upon state approval of Emmerson's

application for an access easement across state land to the Emmerson Property.

In late October 2006, while Emmerson and Walker awaited state approval, Johnson, a self-styled "very sophisticated investor" (Tr. p.208), came to Montana to buy a ranch. Local Realtors showed Johnson the Newhall ranch, located adjacent to the Emmerson property. The Newhall property was on the market; the Emmerson property wasn't. Johnson wanted both properties.

On October 26, 2006 Johnson made an offer on both properties, offering Emmerson more than she would get under her agreement with Walkers. Emmerson informed Walkers of Johnson's better offer. The Walkers insisted that Emmerson move forward with the terms of their exchange agreement.

By as early as October 30, 2006 Johnson knew that the Emmerson property was subject to an exchange agreement with the Walkers. During November 2006, Walkers' and Emmerson's attorneys advised Johnson or his agent that the exchange agreement was, in their opinions, valid and enforceable.

Nevertheless, Johnson insisted on finding a way to make the Emmerson land his own. As detailed in the Statement of Facts, he orchestrated a series of acts over several months calculated to defeat the Walker/Emmerson contract. Walkers had no knowledge of Johnson's activities. They believed that the exchange agreement was moving forward to closing.

To facilitate closing, Walkers sent a letter to Emmerson's counsel on February 14, 2007 tendering the closing documents and asking Emmerson to

set a closing date. On February 23, 2007, Johnson's lawyer, Karl Knuchel, who began representing Emmerson, sent a letter to Walkers' lawyer informing Walkers that Emmerson "repudiated" the agreement and declared it "null and void." (Walker Exh. K[1], Appendix 4).

On February 28, 2007 Emmerson petitioned for declaratory judgment against Walkers (CRR-1) seeking to invalidate the exchange agreement. Johnson agreed to pay Emmerson's legal fees. Walkers responded to the petition requesting that the district court enforce the agreement and order Emmerson to specifically perform her contractual obligations. (CRR-6).

During discovery, Walkers found that Johnson had interfered with the exchange agreement and induced Emmerson to both breach the agreement and file a lawsuit against them. In March 2008, Walkers filed a third party complaint against Johnson alleging that he had tortiously interfered with the exchange agreement. (CRR-21). Walkers sought compensatory damages for emotional distress and punitive damages. Johnson counterclaimed against Walkers, alleging abuse of process, tortious interference of contract, and seeking Rule 11 sanctions. (CRR-26).

The cause was tried before District Court Judge Nels Swandal. The district court entered Findings of Fact and Conclusions of Law on May 12, 2009. Judge Swandal found that the exchange agreement was valid and

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[1] At the beginning of trial the parties stipulated to the introduction of all exhibits (Tr. p. 7, 187, CRR-91 p.1, p.3) as such there are no internal transcript cites to exhibits. Walkers' and Johnson's exhibits were both marked by letters, as such lettered exhibits are referred to either as Walkers' exhibit or Johnson's exhibit.

enforceable and that specific performance was an appropriate remedy for Emmerson's breach. Emmerson was ordered to pay Walkers' attorney fees based on the attorney fee provision of the contract. The Court found that Johnson had tortiously interfered in the contract between Emmerson and Walkers. The court awarded Ace and Rae Walker each $75,000 in emotional distress damages. Even though the court found that Johnson intentionally interfered with the contract, the court did not award Walkers punitive damages from Johnson, finding that Johnson's acts were not malicious. The court dismissed Johnson's claims against the Walkers for tortious interference, emotional distress, and abuse of process.

Emmerson and Johnson each filed a notice of appeal. Neither contests the district court's findings and conclusions declaring the exchange agreement valid and ordering Emmerson's specific performance. Emmerson contests only the court's calculation of attorney fees while Johnson contests the court's finding that he tortiously interfered with Emmerson/Walker agreement. Walkers timely filed a notice of cross appeal, asserting that the district court erred in denying them an award of punitive damages.

STATEMENT OF THE FACTS

Ace and Rae Walker and their children live 7 miles from Big Timber on a small acreage, on Lower Swamp Creek. Ace is Big Timber's doctor. (FOF 8). The Walkers, particularly Ace and his son, have a passion for ranching. The Walkers spent ten years looking for additional ranch property close to their home. In 2000 the Walkers purchased 739 acres known as the "East Fork"

place. At that time Ace worked as a locum tenens for IHS hospitals in Crow Agency and Havre. (FOF 10, 12).

Ace is active in the military reserves. In 2003 he was ordered to a combat position in Iraq. Rae was left as a "single parent." As a result of that fact and the financial strain from Ace's deployment, the Walkers sold their cattle to pay bills and decrease the workload. The Walkers' children were upset about this decision, and Ace promised he would purchase cattle and get back to the family ranch dream after he returned from Iraq. (FOF 13).

Ace's employment changed after his return from Iraq. He was on call at Big Timber's hospital. When on call Ace must be able to reach the hospital within fifteen minutes. The "East Fork" property is 17 miles from Big Timber, it was no longer a viable option for the Walkers' family ranch. Consequently, the Walkers looked for property closer to their home and put their East Fork property on the market for $695,000. (FOF 14, 16).

Emmerson's property is close to the Walkers' home. Emmerson and Walkers had visited about exchanging the East Fork for Emmerson's 480 acres, and during fall 2005 Emmerson expressed her desire to make the exchange. After several conversations an exchange agreement took form. One term of the exchange provided that Emmerson would obtain and assign to Walkers an easement through state land. Emmerson had her lawyer, Jane Mersen, reduce the parties exchange agreement to writing. Walkers made no changes to the Mersen draft. (FOF 17).

Before entering into the agreement both Emmerson and Walkers obtained opinions about the relative attributes of their respective properties. Realtors

Sonny Todd and Don Vaniman and appraiser Rob Walker shared the opinion that easements through the Newhall property and state land were a drawback to both the Newhall and the Emmerson properties. (FOF 21). In spite of this, the Walkers had an "emotional" reason for wanting the Emmerson land; without it they could not achieve their goal of having a family ranch.

The parties executed the exchange agreement on May 15, 2006. (FOF 19, Walker Exh. D, Appendix 1). Walkers took the East Fork property off the market, paid their Realtor $10,000 to terminate the listing, quit looking for other property, and began the process of ordering title reports and securing an assignment of the state easement. At Emmerson's request, the parties used each other's properties during the summer and fall of 2006, prior to the anticipated closing. Emmerson even placed the East Fork utilities in her name. (FOF 20). The Walker/Emmerson exchange was moving toward closing with no problems until Tucker Johnson's arrival; there was no pending contract dispute between Emmerson and Walker.

Tucker Johnson came to Montana in late October 2006 to buy ranch properties. (FOF 25). Johnson, an heir to a Johnson & Johnson Inc. founder, is an extremely wealthy and sophisticated investor. [2](Tr. p. 208). Johnson has purchased at least fifty properties, run several businesses, and has a real estate license he has used to buy and sell real estate. (Tr. p. 207). In the short time Johnson was in Montana in the fall of 2006 and early 2007 Johnson made offers on several properties. Johnson produced buy sells for over $4,000,000 for purchase of the Newhall, Emmerson and Smith properties. (Walker Exhs.

[2] Walker Exhibit FF, page 30

U,V,X). He testified that in addition to those buy sells he made or tried to make offers on the Hauge place, Hathaway place[3] and Carriage House place. He also purchased the Drivdahl place and the Perret place. (Tr. p. 222, 223, 232). He fantasized about "making purchases that could lead all the way up to the base of the Crazies." (Tr. p. 222).

While driving to Bozeman, Johnson saw a "For Sale" sign on the Newhall property, a tract contiguous to Emmerson's property.[4] (FOF 26). The Newhall property is burdened with an approximately 2-mile access easement serving the Emmerson property. (Walker Exh. Y). Realtors advising Johnson agreed that the easement was a "big problem." (Tr. p. 195). Johnson knew that the value of the Newhall property and potential for resale would be greatly enhanced by obtaining the Emmerson property. (CRR-26, ¶22). Johnson wanted both the Newhall and Emmerson tracts, even though the Emmerson property was not for sale. On October 27, 2006, Johnson made written offers to acquire both the Newhall and Emmerson properties. He offered Emmerson $800,000, $105,000 more than what she stood to gain under the existing exchange agreement. His offer to Newhall was made contingent upon his also acquiring the Emmerson tract. (Walker Exh. Z and W).

Emmerson tried to get out of the exchange agreement after she received Johnson's offer. She called Ace the day she received the offer to tell him she had a "better offer." (Tr. p. 96). She also had her lawyer, Jane Mersen, call Walker's lawyer, Mark Josephson, on October 30 to ask how much Walkers

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[3] The Hathaway place alone was listed at four million. (Tr. p. 240).

[4] Contrary to Johnson's Brief (p. 3-4), there was no "for sale" sign on the Emmerson property.

would take in damages for an "efficiency breach" of the agreement. (FOF 29). It is apparent from this inquiry that Mersen was of the opinion that the exchange agreement she drafted was binding. (Tr. p. 285). Emmerson did not sign Johnson's proposed buy-sell. (Walker Exh. Z)

Johnson's Realtor also called Josephson on October 30 to discuss the exchange agreement. Johnson's agent knew that Josephson represented the Walkers, and he passed that information on to Johnson. (Tr. 306-07). Despite that knowledge, Johnson phoned Josephson on November 15, 2006, ostensibly seeking to hire Josephson to represent him. During that conversation Josephson expressed his view that Walkers and Emmerson had a binding exchange agreement, and he advised Johnson that Walkers intended to close the transaction. During this conversation Johnson told Josephson he did not want to cause a dispute. (FOF 31).

All of these calls caused Walkers concern, so they sought assurances that Emmerson intended to close. Josephson wrote a letter to Mersen on November 27, 2006, to reaffirm that the Walker/Emmerson transaction was moving forward. (Walker Exh. M) The letter stated in part:

> If we do not hear from you by 5:00 p.m., Monday, December 4th, we will assume that Ms. Emmerson does indeed intend to continue pursuing the easement application and to honor her obligations under the exchange contract by completing the exchange with Walkers. If Ms. Emmerson's intentions are to not honor the exchange contract, then please notify us by 5:00 p.m. December 4th. 2006.

Neither Mersen nor Emmerson responded to the letter. Accordingly, Walkers and Josephson continued to work on the state easement issue, believing that the parties were moving towards closing the transaction. Neither

Walkers nor Josephson heard from Emmerson, Johnson, or their respective representatives until February 23, 2007. (FOF 33).

Even though Johnson told Josephson that he didn't want to cause a dispute, he continued to insert himself into the Emmerson/Walker agreement. While Walkers were working toward closing, and unbeknownst to them, Johnson was plotting ways to defeat the exchange agreement and acquire the Emmerson property for himself. After Emmerson's attorney told Johnson's agent, Esperti, that the Emmerson/Walker agreement was binding, Johnson retained lawyer Karl Knuchel to send a letter to Emmerson's lawyer Mersen setting out legal theories to void the agreement. (Tr. p. 307; Walker Exh. R) That letter, dated December 12, 2006 stated in pertinent part:

> I have received from your office a signed copy of a Land Exchange Agreement between your client and Wallace C. Walker and Rana Rae Walker....
>
> While reviewing the Agreement, it is apparent that there is no end date for the Agreement. It also appears that Walker controls the trigger on the trade.
>
> My client is committed to purchasing the property but appears to be stymied by the Land Exchange Agreement.
>
> It would appear to me that the Agreement, because of the problem with no end date for your client, is voidable. I also believe that the contingencies may be impossible to meet because I am unaware of the State actually granting an easement across State lands in recent times....

(Walker Exh. R, emphasis in original).

When Emmerson didn't repudiate the exchange agreement per the theories outlined in Knuchel's letter, Johnson suggested that she seek another

legal opinion. He even provided her with a list of lawyers. Emmerson saw Livingston attorney Steve Woodruff. On December 26, 2006 Emmerson reported to Realtor Vaniman that Woodruff concluded that the exchange agreement was binding, in accord with the opinions of Josephson and Mersen. In that conversation Emmerson appeared resigned to close on the Walker transaction, indicating she was "stuck" with it and didn't want to take "legal responsibility" for the consequences of not closing. (FOF 38, 39).

Having no success, Johnson tried another tactic. Around early January 2007, he concocted a scheme whereby he would secretly purchase Walker's East Fork property and exchange it and $135,000 for the Emmerson property. An agreement for an Emmerson/Walker exchange was drafted.[5] Johnson made the offer through Open Range, LLC, an entity that was to be created for this single purpose. Johnson did not disclose that he was the entity's principal. Johnson had made at least six other offers in Montana during this time frame, all using his own name. (FOF 40, Tr. p.260, 261). This was the only instance where Johnson created an entity to hide behind. A buy-sell was drafted naming Open Range as the prospective buyer and signed for the LLC by an attorney-in-fact. (Tr. p. 306).

Nothing came of Johnson's clandestine efforts to purchase the Walker property. When Walkers were told there might be an offer on the East Fork they immediately referred Johnson's Realtor to Emmerson, who they believed,

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[5] Interestingly, even though Emmerson and Johnson later maintained that the Walker/Emmerson exchange agreement was flawed and voidable, the Johnson/Emmerson exchange agreement was identical in form. (Walker Exh. R)

in light of the pending exchange agreement, essentially owned the East Fork. Walkers did not learn of Johnson's role in this offer until discovery commenced in the Emmerson/Walker case. (FOF 42, Tr. p. 103).

Johnson pressed on to acquire the property he wanted. On February 14, 2007, he closed on the Newhall property. (Walker Exh. T). He redoubled his efforts to get the Emmerson property to increase the value of his holdings. Johnson convinced Emmerson to forego the advice of her longtime attorney Mersen. He offered Emmerson the services of his lawyer, Knuchel. Both Emmerson and Johnson signed documents entitled "Waiver and Consent to Litigate Agreement." (Walker, Exhs. BB, CC, Appendix 5-6). The agreements, read together, make clear that Knuchel would continue to represent Johnson on all matters but would confine his representation of Emmerson to the action against Walkers. Johnson agreed to pay Emmerson's attorney fees. Emmerson testified at trial that she would not likely have brought the declaratory judgment action had Johnson not agreed to pay her fees. (FOF 38; Tr. p. 82).

On February 14, 2007, Walkers' counsel wrote Mersen, tendering performance and asking that Emmerson set a closing date within sixty days of an upcoming State Land Board meeting. (Walker Exh. K, Appendix 3). Knuchel, now both Johnson's and Emmerson's lawyer, replied on February 23, 2007, stating that that Emmerson "repudiates" the exchange agreement and "considers it to be null and void." (Walker Exh. J, Appendix 4). Emmerson refused to close within the sixty-day period set forth in the exchange

agreement, choosing instead to use Johnson's lawyer to file litigation aimed at invalidating the agreement.

Johnson continued to insert himself into Emmerson's and Walker's affairs even after Emmerson's lawsuit was filed. Even though Johnson was not a party, only Johnson and Knuchel attended the mediation on the Emmerson litigation. (FOF 49). During the course of discovery Walkers' learned of Johnson's interference in the Emmerson/Walker agreement. As a result, Walker's filed a tortious interference with contract claim against Johnson. (CRR21). In response Johnson counterclaimed against Walkers for tortious interference with contract, abuse of process and Rule 11 sanctions. (CRR-26 p. 3-4). During the course of the litigation Johnson threatened another suit against the Walkers for tortious interference. (Tr. p. 176). Johnson claimed $50,000 in emotional distress damages and sought reimbursement from Walkers of a minimum $50,000 for each time he traveled to Montana by private jet for this litigation. (Johnson Exhs, M, N; Appendix 9, 10; Walker Exh. FF, pp. 99, 102-103).

After trial the District Court ordered Emmerson to specifically perform as an appropriate remedy for the breach, awarded Walkers' attorney fees, found Johnson tortiously interfered with the Walkers contract and awarded Ace and Rae $75,000 each for emotional distress damages. The court denied Johnson's claims for abuse of process and tortious interference with contract and denied Walker's request for punitive damages. (CRR-99, p. 26-27, Tr. p.310).

STANDARD OF REVIEW

Because the district court is in a superior position to weigh the evidence, the Supreme Court will not overturn the court's findings of fact unless the findings are clearly erroneous. *Baltrusch v. Baltrusch*, 2003 MT 357, ¶23, 319 Mont. 23, 27, 83 P.3d 256, 260; *In re Marriage of Bukacek* (1995), 274 Mont. 98, 105, 907 P.2d 931, 935. A district court's findings are clearly erroneous if substantial credible evidence does not support them, if the trial court has misapprehended the effect of the evidence or if a review of record leaves this court with the definite and firm conviction that a mistake has been committed. *Ray v. Nansel*, 2002 MT 191, ¶19, 311 Mont. 135, 53 P.3d 870. Evidence is to be viewed in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court's findings. *Id.*

A district court's conclusions of law are to be reviewed for correctness. *Baltrusch*, ¶23.

The Supreme Court will review a district court's order granting or refusing attorney's fees for an abuse of discretion. Absent an abuse of discretion attorneys fees based on competent evidence will not be disturbed on appeal. *Glaspey v. Wonkman* (1988), 234 Mont. 374, 377, 763 P.2d 666, 668.

SUMMARY OF ARGUMENT

Johnson attempts to elevate his tortious conduct to a constitutional right, arguing that the district court's decision impaired his fundamental right of court access and that he was privileged to interfere in the Walker/Emmerson exchange agreement. When examined critically, Johnson's constitutional arguments are revealed as misdirection. This is a straightforward tortious

interference case appropriately decided by applying well-established precedent.

The bulk of Johnson's theories and arguments are raised before this Court for the first time on appeal. They are untimely, and as a matter of fundamental fairness to the trial court and Walkers, they should not be considered. Johnson had ample opportunity to assert these defenses before the trial court, and he did not do so.

Johnson's theories and arguments also fail on their merits. Both issues that Johnson frames for this Court's decision, and all of his arguments, are premised on his incredible claim that all he did was urge and fund Emmerson's litigation against the Walkers. Johnson's premise is a whitewash of the facts. The district court's findings of fact, uncontested on appeal, reflect that Johnson did much more than merely promote litigation. Indeed, he insinuated himself into the Emmerson/Walker exchange agreement, directly interfered with it over a period of several months, and ultimately induced Emmerson to repudiate and breach it. Johnson's premise is simply untrue, and the arguments and theories he has built on it consequently fail.

Johnson claims that the district court's application of tortious interference elements to his conduct chills his "derivative" fundamental litigation rights. As a stranger to the Walker/Emmerson exchange agreement he has no such rights. He has no standing to raise any issues arising out of that agreement. Emmerson, as a party to the agreement, had an absolute right to petition the court to contest the agreement's validity. She exercised that right and makes no claim that her rights were chilled or impaired in any way. Johnson should

not be allowed to evade tort liability by cloaking himself in Emmerson's rights.

The district court properly concluded that Johnson tortiously interfered with the Walker/Emmerson exchange agreement. The district court's decision properly balanced Walkers' expectation that they should realize the benefit of their bargain against Johnson's interest in obtaining the Emmerson property for his private gain. Johnson's pattern of conduct, as found by the district court, interfered with the exchange agreement in a manner that was neither justified nor privileged.

Johnson's tortious interference with the Walkers' contract caused Walkers to suffer emotional distress damages. The Walkers are entitled to reasonable compensation for any mental and emotional distress they experienced as a result of Johnson's actions. The district court carefully considered the testimony of the damages Walkers sustained and exercised calm and reasonable judgment in awarding Ace and Rae $75,000 each in emotional distress damages.

The district court properly awarded attorney fees to Walkers, determining that the claims associated with Emmerson and Johnson for the most part could not be segregated. The district court was correct in finding that where claims are so intertwined that segregation is impossible the award of the entire attorney fees is appropriate.

The district court misapprehended the law with respect to the legal standard of "malice" in the context of punitive damages. Walkers were not required to prove that Johnson acted with ill will or spite. Johnson's actions

met the definition of "malice" required for an award of punitive damages in that Johnson's tortious interference with Walker's contract was deliberate and in conscious or intentional disregard of the high probability of injury to Walkers. This matter should be remanded to the district court for a hearing on punitive damages.

ARGUMENT

I. JOHNSON RAISES NEW ARGUMENTS AND THEORIES THAT WERE NOT RAISED AT THE TRIAL COURT. THESE NEW ARGUMENTS AND THEORIES ARE UNTIMELY AND SHOULD NOT BE CONSIDERED BY THIS COURT

The bulk of Johnson's opening brief is dedicated to presenting the following three arguments, all raised for the first time on appeal:

- Johnson cannot be held liable in tort for encouraging Emmerson to exercise her constitutionally-protected right to seek redress in the courts. (Johnson Br., 13-16, 27-31).

- Walkers' tortious interference claim has a "chilling effect" on Emmerson's (and, by extension, Johnson's) right to access the courts. (Id. at 16-20).

- The district court incorrectly permitted Walkers to prosecute their tort claim under a tortious interference theory when it should have recognized a "litigation privilege" and examined Walkers tort claim in light of legal theories more "protective" of Johnson's rights. (Id. 16-26).

None of these theories were brought before the district court. Before the trial court, Johnson answered Walkers' tortious interference claim with a general denial and affirmative defenses of laches, collateral estoppel, unclean hands, and failure to state a claim. (CRR-26 at p. 3; Appendix Exh. 5). On

April 2, 2009, six days before trial, Johnson filed a Pre-Trial Statement setting forth his contentions and what he claimed was the applicable law. (CRR-90, Appendix 6). In that statement, Johnson's confined his legal arguments to addressing the elements of a *prima facie* case of tortious interference; the factors considered in determining whether a party's acts were improper in a claim for tortious interference; and a definition of malice in the context of an interference claim. Johnson tried his case before the district court based upon those legal theories and arguments. At no time during the district court proceedings did Johnson assert the new arguments and theories summarized above. The district court had no opportunity to consider these theories and rule on the issues they raised. The Walkers had no opportunity or reason to address these theories or make a record countering them.

Arguments and legal theories presented to the Montana Supreme Court for the first time on appeal are untimely and will not be considered. *State v. Ferguson*, 2005 MT 343, ¶38, 330 Mont. 103, 126 P.3d 463. "[I]t is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Agderson*, 2003 MT 284, ¶12, 318 Mont. 22, 78 P.3d 850. "The underlying principles behind this rule are judicial economy and fairness to the trial courts and the parties." *Thibodeau v. Bechtold*, 2008 MT 412, ¶29, 347 Mont. 277, 198 P.3d 785.

Johnson had every opportunity to assert these defenses before the district court. He did not do so. Accordingly, Walkers submit that this Court should decline to consider the new theories and arguments set out at the head of this section, including those set out in Arguments I-III of Johnson's Opening Brief

(excepting the argument concerning the district court's calculation of damages in Argument 2.B, pp. 17-20).

II. JOHNSON'S OPENING BRIEF IS BASED ON A RENDITION OF THE FACTS THAT IS SO INCOMPLETE AS TO MISLEAD THE COURT

As a preface to their further response to Johnson's arguments, Walkers request that this Court note that Johnson has based his arguments on a set of facts he likes, not those in the record. Johnson purports not to raise any issues with the facts that the district court found (Johnson Br., p. 7), yet he has failed to present those facts accurately and completely.

Johnson has airbrushed the facts into a fantasy that all he did was urge Emmerson to seek a court interpretation of the exchange agreement, finance her litigation, and make a routine backup offer on the Emmerson property. *See, e.g.*, Johnson Br., pp. 11, 13, 26, 37. He presents himself as some sort of benevolent, access-to-justice philanthropist. In fact, Johnson did *much* more than that. The district court's findings reflect that Johnson engaged in conduct over a several month period calculated to defeat the Walker/Emmerson exchange for his own gain. (FOF 25-50).

Johnson's pertinent acts include the following:

- Instructed his lawyer to send Emmerson's lawyer a letter setting out legal theories she could use in efforts to void the exchange agreement. (Walker Exh. R; Appendix 2).

- Johnson or his lawyer misrepresented information to Emmerson, leading her to believe her easement was at risk by reason of the exchange agreement and that she had made a "mutual" mistake. (Tr. p. 64).

- Attempted to secure the legal services of Mark Josephson, even though he knew or should have known that Josephson represented Walkers in the pending exchange transaction. (FOF 31).

- Undermined Emmerson's relationship with her longtime and trusted lawyer who had drafted the exchange agreement and opined that it was valid. (Tr. pp. 79-80).

- Induced Emmerson to seek other counsel in an effort to find a way to breach the agreement. (FOF 38).

- Even though he knew that three lawyers had opined that the exchange agreement was valid and binding, he continued to pursue the Emmerson property and encouraged Emmerson to repudiate the contract. (Walker Exh. J; Appendix 4).

- Continued to urge Emmerson to forego closing on her exchange with Walkers, even though she had resigned herself to moving forward with the exchange and didn't want to incur legal responsibility attendant to trying to invalidate the exchange agreement. (FOF 38).

- Entered an exchange agreement with Emmerson, promising to convey her Walker's property and pay her an additional $135,000 over the value of the Walker/Emmerson exchange. (Walker Exh. P; FOF 40).

- Secretly tried to purchase Walkers' East Fork property using an LLC with an undisclosed principal (to facilitate his proposed exchange with Emmerson). (FOF 40, 43).

- Tendered the services of his lawyer to Emmerson so long as Johnson and Emmerson pursued the same goal, invalidating the Walker Emmerson agreement. (Walker Exhs. BB, CC; Appendix 5, 6; FOF 44).

- Johnson's and Emmerson's lawyer, presumably with Johnson's full knowledge, ignored the opinions of three other lawyers and directed Emmerson to repudiate the exchange agreement. (Walker Exh. J; Appendix 4).

- Convinced Emmerson to file a lawsuit against the Walkers and agreed to pay her litigation fees. (FOF 43).

- Johnson, in essence, "orchestrated and directed" Emmerson's lawsuit against Walkers. (FOF 44).

Johnson's acts far and away exceed "simply advising and financially supporting" Emmerson in her declaratory judgment action.

Not only is Johnson's view of his own acts delusional, his theory that Emmerson did not breach the exchange agreement is wholly untenable. *See* Johnson Br. p.13. That position is obviously taken to suggest that Emmerson, and by extension Johnson, did nothing "wrong" but instead sought merely to ascertain the validity of the agreement in a court of law. Johnson's statement is made without any analysis or reference to the record. As discussed in the next section, the record on appeal clearly shows that Emmerson repudiated the exchange agreement, and she materially breached the agreement by her failure to tender performance when it was due.

Johnson's arguments rely on his sterilized version of the facts and his faulty premise that Emmerson did not breach the exchange agreement. From Johnson's limited viewpoint, some of his arguments make a good first impression. But when the district court's findings of fact are given their due, Johnson's arguments must be found to either fail or be inapplicable to the case in the first instance. The Walkers urge that this Court analyze the district court's decision in the context of the facts it found, not the facts that Johnson proposes.

III. EMMERSON COMMITTED A MATERIAL BREACH OF THE EXCHANGE AGREEMENT BY HER WHOLESALE REFUSAL AND FAILURE TO PERFORM THE COVENANTS THAT SHE MADE.

Johnson's assertions throughout his brief that Emmerson did not breach the exchange agreement are inexplicable in light of the terms of the agreement and facts found by the district court. The exchange agreement provided that closing would occur 60 days after Emmerson received notice of action by the State Land Board on her application for easement. (Exh. D, ¶3; Appendix 1). Walkers' obligation to close the transaction was contingent upon certain content in the state lands easement, but they had the right under the contract to waive the contingency and proceed (*Id.* ¶5).

On February 14, 2007 Walkers tendered performance on the Walker/Emmerson contract via the following letter:

> Please inform your client that following the State Land Board Meeting which I understand is on February 20th, the Walkers will tender performance of their side of the transaction and deposit the documents necessary for said performance with Sweet Grass Title Company in Big Timber, Montana....
>
> My clients would prefer to close as soon as possible....
>
> Please confirm in writing that your client will be performing her obligations under the party's agreement and provide notice of a closing date convenient to your client that is not later than the 60 day period set forth in the party's agreement.

Walker Exh. K; Appendix 3. Walkers tendered performance and waited to close.

Emmerson did not confirm that she would perform the exchange, and she refused to set a closing date. Instead, she informed Walkers via a February 23, 2007 letter from Johnson's and her attorney of her intent not to perform:

> I am in receipt of a letter that you sent to Jane Mersen regarding the Walkers' intention to implement the exchange agreement. Be advised that by this letter that Val Emmerson repudiates the "Exchange agreement" and considers it to be null and void.

Walker Exh. J; Appendix 4 (emphasis added). Five days later Emmerson filed her petition to invalidate the exchange agreement.

This Court has recognized that a party may repudiate a contract before performance is due. Repudiation is a "positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties." *STC, Inc. v. Billings* (1975), 168 Mont. 364, 374, 543 P.2d 374, 379. Such anticipatory repudiation must be entire, absolute, and unequivocal. *Id.*, 168 Mont. at 373-74, 543 P.2d at 379.

It is hard to imagine a more absolute and unequivocal statement of repudiation than that set out in Emmerson's letter. She used the term "repudiate"; she declared the exchange agreement "null and void." Moreover, she filed suit to invalidate the agreement within days, making clear that she had no intent to fulfill her promise and complete the exchange. The district court correctly found that Emmerson repudiated the contract. (FOF 47).

Repudiation creates an immediate right of action for breach of contract even though the time for performance has not yet arrived. *See Lorang v. Fortis*

Ins. Co., 2008 MT 252, ¶104, 345 Mont. 12, 192 P.3d 186. The injured party may, as Walkers did in their countersuit, seek to enforce the contract.

Even if Emmerson's letter and lawsuit was not an anticipatory breach, her subsequent failure to set a closing date and refusal to exchange deeds was a material breach of the agreement. A material breach is one that touches the fundamental purpose of the contract and defeats the object of the parties in making the contract. *R.C. Hobbs Enterprises, LLC v. J.G.L. Distributing, Inc.*, 2004 MT 396, ¶33, 325 Mont. 277, 104 P.3d 503. As described above, Emmerson had 60 days from the date of the State Land Board meeting to tender performance under the agreement. The parties expressly made time of the essence in their agreement. (Walker Exh. D ¶15; Appendix 1); *see* Mont. Code Ann. §28-3-602 ("Time is never considered as of the essence of a contract unless by its terms expressly so provided"). Nothing in the agreement tolled or suspended Emmerson's obligation to perform while she prosecuted her suit to test the agreement's validity. Walkers tendered their performance within the time frame set forth in the contract; Emmerson did not. Emmerson's total failure to perform defeated the fundamental purpose of the exchange agreement—*i.e.* to exchange real estate—and thus was a material breach.

Emmerson's breach of contract was a wrongful act. Johnson continually misdirects this Court's attention to his acts encouraging Emmerson's lawsuit, acts that he contends are protected or privileged. However, Johnson's acts weren't confined to promoting litigation; he also engaged in a pattern of conduct that induced Emmerson's wrongful breach, and that conduct is the

proper center of this Court's focus when reviewing the district court's decision. As further discussed herein,[6] the protections and privileges that Johnson asserts as a shield against liability don't apply to his acts that induced Emmerson's breach.

IV. JOHNSON, AS A STRANGER TO THE CONTRACT, HAD NO FUNDAMENTAL LITIGATION RIGHTS WITH RESPECT TO THE WALKER/EMMERSON EXCHANGE AGREEMENT, AND HIS CONDUCT THAT INDUCED EMMERSON'S BREACH OF THAT AGREEMENT WAS NOT PRIVILEGED.

Although he comes at it from several directions, Johnson's attack of the district court's decision is basically two-pronged. He argues that the district court's conclusion that Johnson tortiously interfered with the Walker/Emmerson agreement should be set aside because (i) the court failed to protect Johnson's "fundamental litigation rights" (Johnson's Br., pp. 11-12, 16) and (ii) Johnson enjoyed a legal privilege to take the actions that he did (*Id.*, pp. 27-31). Both arguments fail. As further discussed below, Johnson had no litigation rights to protect with respect to the Walker/Emmerson contractual relationship because he was a stranger to the contract. Further, his claim of privilege is based on his whitewash of this case's facts. While a person may, within limits, be privileged to promote a contracting party's litigation, such privilege does not extend to the conduct that Johnson exhibited in inducing Emmerson's repudiation and breach of the exchange agreement.

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[6] Argument IV.B, *infra* at p. 26

A. Johnson had no "fundamental litigation rights" with respect to the Walker/Emmerson exchange agreement.

Emmerson had an absolute right to petition the court to seek redress of her grievances arising out of the exchange agreement. No one argues otherwise. Nothing that Walkers claimed or that the district court decided impaired that right. Emmerson filed her declaratory judgment action, and her grievances were given a full and fair hearing. Emmerson does not contest the district court's ruling on the validity of the exchange agreement nor does she contend that her rights to access the court were chilled or impaired in any way.

Johnson's claimed "fundamental right to litigate" is non-existent with respect to issues arising out of the exchange agreement. Emmerson's right to access the courts to challenge the validity of the agreement flowed from her status as a party to that contract. Johnson had no standing to litigate any issues arising under the exchange agreement because he was neither party to nor a third-party beneficiary of that contract. In *Palmer v. Bahm*, 2006 MT 29, ¶13, 331 Mont. 105, 128 P.3d 103, this Court stated:

> Generally, unless he is an intended third-party beneficiary of the contract, a stranger to a contract ***lacks standing*** to bring an action for breach of that contract. *See Ludwig v. Spoklie* (1996), 280 Mont. 315, 318-20, 930 P.2d 56, 58-59 (holding that strangers to a contract who are not intended third-party beneficiaries of the contract lack standing to bring an action based on an alleged violation of that contract); *see also* 13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 37:1, at 5 (4th ed. 2000) (noting that, with the exception of third-party beneficiaries, "courts recite talismanically...that ***'strangers to a contract' have no rights under the contract***").

(emphasis added).

Johnson, as a stranger to the contract, had no standing—*i.e.* no threshold right to access the courts—to seek redress of issues arising out of the exchange agreement. His arguments, though all dressed up in constitutional garb, must fail because he had no fundamental litigation rights, derivative or otherwise, in want of protection. Johnson should not be permitted to cloak himself in Emmerson's rights and thereby escape liability for his tortious conduct that induced Emmerson to breach her contract with the Walkers.

B. Johnson's claimed "litigation privilege" cannot protect him from tort liability for inducing Emmerson's breach of the exchange agreement.

Both of the issues that Johnson frames for this Court's decision are premised on his claim that all he did was urge Emmerson to file her declaratory judgment petition and finance her litigation. (Johnson Br., p. 1). In his brief he frames the issue as "whether a tortious interference claim may be based on the mere filing of litigation.... (*Id.*, p. 20). Thus it is critical for this Court to evaluate the truth of Johnson's premise in light of the district court's uncontested findings of fact. If all Johnson did was promote litigation, and if his motives were as pure as he claims, then his argument may have merit, and his actions may be privileged. But if the premise of his stated issues fails—*i.e.* if Johnson's acts went well beyond promoting litigation—Johnson's arguments are rendered inapplicable and should gain no traction.

The wide disparity between Johnson's selected facts and the uncontested facts on appeal has been described above. *See* Argument II, supra. The record on appeal reflects that Johnson's involvement in the Walker/Emmerson exchange extended far beyond urging and funding Emmerson's litigation.

Indeed, he interfered with the exchange agreement in a much more direct and culpable manner and over a several month period. Some of the more important particulars of his conduct are summarized above.[7]

The limited extent and reach of the privilege to file lawsuits that Johnson advocates is set out in the cases he cites. In *Eddy's Toyota of Wichita, Inc. v. Kmart Corporation* (D. Kan. 1996), 945 F. Supp. 220, the court found that Kmart had done two things to interfere with a sublease agreement between Eddy's and its adult bookstore tenant: (i) organize the formation and delivery of protest letters, and (ii) had its agent file a lawsuit against Eddy's. The court concluded, in what was tantamount to an advisory opinion,[8] that the First Amendment protects both the letters and the lawsuit unless the latter was filed maliciously. *Id.* at 225-26. Kansas law requires that a tortious interference defendant engage in malicious conduct. *Id.* In any event, *Eddy's* is distinguishable from this case by the very limited acts that Kmart did to protest Eddy's sublease. Unlike Johnson, Kmart did not induce a breach of contract, and nothing reported suggests that it, like Johnson, engaged in a pattern of conduct toward that end.

Similarly, *Nesler v. Fisher and Company* (Iowa 1990), 452, N.W.2d 191, cited by Johnson (Johnson Br. pp. 28-30) does not advance his position. In

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[7] *See* Argument II, *supra at* p. 18

[8] The *Eddy's* court determined early in its opinion that Eddy's failed to prove an essential element of its case. The discussion relating to the First Amendment issues were not essential to the case's disposition. Note also that the elements of tortious interference applied in Eddy's are different than Montana law. Kansas law requires that the interference induce a breach of contract. *See Eddy's*, 945 F. Supp at 224.

Nesler, the court instructed a trial court, on remand for retrial, that the defendant's acts of filing lawsuits were not in and of themselves improper acts that would form the basis for tortious interference liability. *Id.*, 197-98. The court explained that whether or not those acts were improper depended upon motive: "[m]aking the complaint by itself is not improper; however, when the act is done with a desire to interfere with contractual relations, the motive behind the act rather than the act itself is determinative." *Id.* at 198 (*citing* RESTATEMENT (SECOND) OF TORTS §767, comment d).

As with *Eddy's*, Johnson relies on law he cites from *Nesler* to further his argument that he can't be held liable in tort for Emmerson's litigation unless the lawsuit was filed maliciously or without a good-faith belief in its merits. Again, that may be the correct outcome, if promoting litigation was all Johnson did. But it was not; Johnson's conduct in his interference with the exchange agreement and inducing its breach is not protected even under the most generous extension of these cases. Johnson was not privileged to induce Emmerson to breach the contract. He was not privileged to make secret deals, misrepresent information to a contracting party, ignore the opinions of three lawyers, undermine business relationships, and do other things calculated to deprive Walkers of the benefit of their bargain. He needed to mind his own business.

V. THE DISTRICT COURT, APPLYING THIS COURT'S WELL-SETTLED PRECEDENT TO THE FACTS IT FOUND, PROPERLY CONCLUDED THAT TUCKER JOHNSON, A STRANGER TO THE CONTRACT, TORTIOUSY INTERFERED WITH THE EXCHANGE AGREEMENT BETWEEN EMMERSON AND THE WALKERS.

Johnson argues that "under the version of the facts most favorable to Walkers, all that can be said is that he urged Emmerson to seek a court interpretation..., and he financed her in pursuing her declaratory judgment action." (Johnson Br., p.13). As discussed above, the district court found that Tucker Johnson did much more than that in his concerted efforts to interfere with and defeat the Walker/Emmerson exchange agreement. The district court was correct in finding that Johnson had a legal duty not to interfere with contracting parties performance of their agreement and that he tortiously breached that duty.

A. Johnson, as a stranger to the contract, had a legal duty not to interfere with performance of Emmerson's and Walkers' pending exchange agreement.

The right of persons to enter into contracts and the private, contractual relationships that result are accorded the utmost respect and protection under the law. As stated by this Court:

> First and foremost, the sanctity of contracts is one of the basic principles of all jurisprudence. It is one of the fundamental doctrines of Anglo-American law. If contracts were to be easily set aside and repudiated, one of the very bases of our law would be gone.

Schantz v. Minow (1966), 147 Mont. 228, 254, 411 P.2d 362, 377, *quoting Randolph v. Ottenstein* (D.D.C. 1965), 238 F. Supp. 1011, 1013. "The fundamental tenet of modern contract law is freedom of contract...."

Arrowhead School Dist. No. 75 v. Klyap, 2003 MT 294, ¶20, 318 Mont. 103, 79 P.3d 250.

The law protects contracting parties from others who meddle in contracts that are none of their business. Such interlopers are strangers to the contract and, as such, have no rights under the contract. *See Palmer v. Bahm*, 2006 MT 29, ¶13, 331 Mont. 105, 128 P.3d 1031. This Court has long held that strangers to a contract have a duty not to interfere with its performance and that a violation of that duty is actionable in tort. *See Burden v. Elling State Bank* (1926), 76 Mont. 24, 30, 245 P. 958, 959; *Phillips v. Montana Educ. Ass'n* (1980), 187 Mont. 419, 423, 610 P.2d 154, 157. The fact that there may also be a claim against the party who breaches the contract, as was the case here with Emmerson's breach, is no defense to the person who interfered with the contract and induced the breach. *Id.*

B. Johnson violated his duty not to interfere with the exchange agreement, and the Walkers were damaged by his actions.

Johnson was a stranger to the Walker/Emmerson contract. The exchange agreement had been in place for several months before Johnson had any knowledge of the parties, their agreement or the subject land. Nevertheless, he involved himself in a contractual relationship with the purpose of denying Walkers the benefit of their bargain.

This Court has set out the elements for establishing a *prima facie* case of tortious interference with contract as follows:

> [T]he plaintiff must establish the defendant's acts: 1) were intentional and willful; 2) were calculated to cause damage to the plaintiff in his or her business; 3) were done with the unlawful purpose of causing damage or loss, without right or

> justifiable cause on the part of the actor; and 4) that actual damages and loss resulted.

Hardy v. Vision Service Plan, 2005 MT 232, ¶18, 328 Mont. 385, 120 P.3d 402 (*citing Grenfell v. Anderson*, 2002 MT 225, ¶64, 311 Mont. 385, 56 P.3d 326).

In its review of the district court's determination that Walkers established a *prima facie* case of tortious interference, this Court must examine Johnson's conduct leading up to Emmerson's repudiation of the exchange agreement. *See* FOF 25-50. Johnson does not dispute the district court's findings of fact. (Johnson Br. at 10).

There can be no question that three of the four tortious interference with contract elements are easily satisfied. Johnson acted intentionally and willfully. His acts were directed at obtaining the Emmerson property, and he affirmatively acted to achieve that end. As to the second element, Johnson's clear goal was to obtain the Emmerson property for himself. By encouraging Emmerson to breach the exchange agreement and refuse to perform, he both knew and intended that Walkers would be deprived of the benefit of their bargain—the land that they had long sought. There can also be no dispute about the fact that Walkers were damaged by Johnson's inducement of Emmerson's breach and her refusal to perform.

The only element of the Walker's tortious interference with contract claim that Johnson disputes is the third one, claiming that he was justified to act as he did. Once it was shown that he acted intentionally and willfully to interfere with the exchange agreement, Johnson had the burden to prove that he was justified in doing so. *Phillips*, 187 Mont. at 424, 610 P.2d at 157.

This Court considers the factors set out in the Restatement (Second) of Torts §767 to assess whether a person's interference with a contract is "improper." In *Bolz v. Myers* (1982), 200 Mont. 286, 295, 651 P.2d 606, 610, the factors are set out as follows:

> (a) the nature of the actor's conduct: (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and, (g) the relations between the parties.

The district court addressed each of the Restatement factors in reaching its conclusion that Johnson tortiously interfered with the exchange agreement. (COL 15-17).

Johnson generally criticizes the district court's "mechanical" application of the tortious interference elements. (Johnson Br., p. 31). If by "mechanical" he means that the district court correctly applied this Court's precedent to the facts it found, then the Walkers agree. When those facts (not the truncated version advanced by Johnson) are considered in light of Restatement factors it is hard to fault the district court's conclusion.

Johnson claims that his conduct was innocent, simply that of a mere advisor and financier of Emmerson's lawsuit (Johnson Br., p. 26). But the facts reflect that he acted secretly and often deceptively behind the scenes to induce Emmerson's breach of contract. He claims to have expected the court to decide Emmerson's case in a short period of time, yet in no real world would any sophisticated investor or his lawyer really believe that. Johnson claims he had a good-faith belief in the merits of the litigation he promoted

(*Id.*, p. 31), even though he proceeded knowing three lawyers had already concluded that the exchange agreement was valid.

Johnson's motives and the interests he chose to advance were to increase his land holdings and the value of the Newhall property. (CRR-26 ¶22, and prayer for relief; Appendix 5).[9] Once an intention to interfere with a contract has been shown, "liability usually will turn upon the ultimate purpose or objective with the defendant is seeking to advance." *Phillips*, 187 Mont. at 424, 610 P.2d at 157. In this case Johnson's ultimate purpose of his interference was the self-serving accumulation of more wealth. Johnson's interest in improving his financial situation does not outweigh Walkers' right to enjoy the benefits of their contract, free of third party interference. *See* RESTATEMENT (SECOND), TORTS, §767, Comment f ("If the interest of the other has been already consolidated into the binding legal obligation of a contact...that interest will normally outweigh the actor's own interest in taking that established right from him.")

Johnson contends, incorrectly, that a tortious interference claim must be supported by conduct that is wrongful in itself. (Johnson Br., p. 35). He quotes Zamore, 1 *Business Torts*, 11.04[1] (2008 ed.), for this proposition, but the quote does not support his point; it says only that a court may be more likely to impose tort liability if the underlying conduct is wrongful or unlawful.

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[9]Johnson asked "Walkers to pay Johnson for losses incurred as a result of their tortious interference in Johnson's acquisition of the Emmerson parcel and his resultant failure ***to realize increased value to real property holdings already owned by him and that are contiguous to the Emmerson parcel.***" (emphasis added)

Walkers contend that record overwhelmingly reflects that Johnson conduct was wrongful, but even conduct that is not wrongful or unlawful can support a tortious interference claim. *See* RESTATEMENT (SECOND) OF TORTS §767, comment c.

Johnson argues that he escapes liability because the district court made no finding that he acted maliciously. (Johnson Br., pp. 26, 28, 30-31). Tortious interference with contract does not require a finding that Johnson acted with "malice" in the common, ill will sense of the term. The Restatement acknowledges that some interference cases have employed the term, but "the context and the course of decisions make it clear that what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.'" RESTATEMENT (SECOND) OF TORTS, §766 comment s. In a case that Johnson relies heavily upon, the court recognized that "malice, as such, is not an element of a claim of interference." *Nesler v. Fisher and Company* (Iowa 1990), 452 N.W.2d 191, 196.

The district court correctly applied the elements of tortious interference with contract to the facts that it found. Johnson did not meet his burden of proof of showing at trial that his actions were justified.

VI. THE DISTRICT COURT PROPERLY AWARDED COMPENSATORY DAMAGES TO BOTH ACE AND RAE WALKER FOR JOHNSON'S INFLICTION OF EMOTIONAL DISTRESS.

Walkers' emotional distress damages arise out of an independent tort, Johnson's interference with their contract. Walkers' damages do not arise out of a stand-alone emotional distress claim. This court clarified in *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶66, 351 Mont. 464, 215 P.3d 649, that when

emotional distress is claimed as an element of damage for an underlying tort claim (parasitic emotional distress damages), the standard set forth in the Mont. Pattern Jury Instr. 2d ed. 25.02, is appropriate. That instruction allows reasonable compensation for any mental and emotional suffering and distress experienced by the plaintiff and reasonably probable to be experienced in the future. The only limitation on calculating emotional distress damages is a requirement of the "exercise of calm and reasonable judgment." *Id.* "[T]he severity of the harm should govern the amount, not the availability, of recovery." *Vortex Fishing System, Inc. v. Foss,* 2001 MT 312, ¶31, 308 Mont. 8, 38 P.3d 836.

This Court affirmed the award of emotional distress damages in a tortious interference case involving interference with a prospective purchase of real estate. In *Maloney v. Home and Investment Center, 2000 MT 34, 298 Mont. 213, 994 P.2d 1124,* the Maloneys expressed an interest in buying property adjacent to their land. The landowner said he would notify Maloneys if he planned to sell. The landowner contacted the defendant Realtor and directed the Realtor to offer his land to Maloneys first. Failing to notify Maloneys, the Realtor sold the land to another party and received a higher commission. Based on the tortious interference this Court affirmed an award of $100,000 in emotional distress damages for "shock, worry, anger, disappointment and frustration" even though Maloneys had no existing contract. *Maloney* recognized emotional distress damages that arise from a subjective relationship with property on a "personal-identity" level. *Id.* ¶71.

Johnson complains that the district court awarded damages of $75,000 to each Ace and Rae "based almost solely on the fact that Walker testified that he thought he was entitled to $50,000 damages because Johnson testified that he believed his emotional distress damages (for his counterclaim) were $50,000".[10] (Johnson Br. p. 18). That assertion is wrong. Ace did not testify as such, and it overlooks the Walkers' testimony and the district court's detailed findings describing the extent of the Walkers' damages. The court found that the Walkers had an emotional interest and had formed a "personal identity" with the Emmerson property. (COL 20). In ten years this was the only property that Walkers could afford within fifteen minutes of Big Timber. Johnson looked for two days before writing his first offer on Emmerson's property. In so many words Johnson acknowledged that he can buy just about anything, anywhere. (Tr. pp. 208, 222, 229). The Walkers, who live in Big Timber 365 days a year, stood by and watched Johnson lease the Emmerson property during the pending lawsuit in case he wanted to use it for the few days he was in Montana. Johnson testified:

> Q. But you've been using the property under the terms of the lease.
>
> A. Very, very passively. I would say that I have not grazed it. I have not hunted that particular piece of property this year, but I've used it in the sense that I have the ability to use it. And sometimes for me, personally, having something reserved and held for me is worth the expense.

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[10] Johnson claimed compensatory damages including $50,000 for each time he chartered a private jet to Montana for this litigation and $50,000 in emotional distress damages. During trial Johnson withdrew his claim for reimbursement for his private jet. (Tr. pp. 274-75)

(Tr. p. 234). The Emmerson property was more to the Walkers than just a piece of land to be used once in a while. Given the personal loss and strain on the family during Ace's combat service in Iraq, it was a symbol as much as anything of Ace's promise to move this family back to normalcy and the life that had been disrupted.

As a result of Johnson's actions, Walkers had marital problems, trouble with their son, and Ace sought counseling. (FOF 52-53). The Walkers experienced frustration, anguish, anger, disappointment, tears, embarrassment, loss of sleep, anxiety, and worry. (COL 18). They used the children's college fund to pay fees for the lawsuit. Chase lost faith in his father's promise and instead starting working with other ranchers. (FOF 52).

The district court not only heard the Walkers testify regarding their emotional distress, the court saw that distress:

> While it is difficult to put in words the impact on the Walkers, this Court saw the reactions of the Walkers during trial, and saw that both Ace and Rae were reduced to tears. They appeared anguished and distressed. It is this Court's opinion their reactions were authentic and not contrived. Ace appeared to be embarrassed by his public display of his emotions and tears.

(FOF 53). This emotional distress was compounded by the meritless counterclaims Johnson filed against the Walkers. (CRR-26, Appendix 7). As a part of those claims Johnson demanded a minimum of $50,000 for rental of a private jet for each trip he made to Montana to participate in this litigation. Additionally, Johnson claimed $50,000 emotional distress damages. (FOF 55).

As the case wore on Johnson threatened Walkers with a second lawsuit for interference with contract and implied that Ace violated his medical privacy. The court recognized the emotional distress created by these acts:

> These ongoing threats create additional stress to the Walkers. The Walkers are very aware that Johnson has the money to continue to file lawsuits and fund lawyers in cases against them. Johnson had previously made it clear to Ace that he would do and spend what he needed to get the Emmerson property. During the trial, Johnson implied that Walkers had violated his medical privacy, which is completely unfounded. These threatening innuendos produced anxiety for the Walkers. Johnson's attitude, money and past actions continue to make these threats of another suit distressing [to] the Walkers.

(FOF 55).

Testimony on damages is to be viewed in a light most favorable to the plaintiff. *See French v. Moore* (1983), 203 Mont. 327, 336, 661 P.2d 844, 849. This Court has stated that:

> The law does not require that any witness should have expressed an opinion as to the amount of damages that would compensate for humiliation, distress, or embarrassment. The law requires only that the trier of fact exercise calm and reasonable judgment, and the amount of award rests of necessity in the sound discretion of the trier of fact.

Johnson v. Murray (1982), 201 Mont. 495, 506, 656 P.2d 170, 175.

The Walkers asked the district court to award $250,000 to $500,000 in emotional distress damages. (CRR-98, p. 16). The court awarded $75,000 each to Ace and Rae Walker. Given all the facts, the amount of the emotional distress damages, if anything, was low; the award amount was clearly not arrived at by passion or prejudice.

VII. THE DISTRICT COURT APPROPRIATELY CALCULATED WALKERS' ATTORNEYS' FEES AWARD.

A court may award attorney fees only where a statute or a contract provides for their recovery. *Stavenjord v. Montana State Fund,* 2006 MT 257, ¶21, 334 Mont. 117, 146 P.3d 724. Paragraph 13 of the exchange agreement provided for an award of "any costs or expenses, including reasonable attorney's fees" to the prevailing party. (Walker Exh. D, Append. 1). After a hearing on attorney's fees, the district court determined that Walkers were entitled to an award of $35,505.95 in attorney fees and an award for costs of $3,148.50. (CRR-122; Order p.7).

The district court evaluated the reasonableness of Walkers' attorney fees under the seven guidelines recognized by this Court for assessing the reasonableness of attorney fees:

> (1) the amount and character of the services rendered; (2) the labor, time and trouble involved; (3) the character and importance of the litigation in which the services were rendered; (4) the amount of money or the value of the property to be affected; (5) the professional skill and experience called for; (6) the attorney's character and standing in their profession; and (7) the results secured by the services of the attorneys.

Chase v. Bearpaw Ranch Assoc., 2006 MT 67, ¶38, 331 Mont. 421, 133 P.3d 190.

Emmerson does not dispute that that the fees were reasonable under the seven-part *Chase* test. Emmerson argues only that the District Court abused its discretion in failing to segregate the fees between the Emmerson claims and the Johnson claims. (Emmerson Br. p.13).

Emmerson correctly states that where a lawsuit involves multiple claims or theories, an award of attorney fees must be based on the time spent by the prevailing party's attorney on the claim or theory under which attorney fees are allowable. *See Northwestern Nat. Bank v. Weaver-Maxwell* (1986), 224 Mont. 33, 44, 729 P.2d 1258, 1264-65. However, Emmerson conveniently ignores prevailing case law allowing the district court to consider intertwined claims where segregation is not possible. Emmerson also fails to mention that there was no testimony at the hearing by either expert that would aid the district court in discerning which fees pertained to particular claims.

At the attorney fees hearing, Walkers' attorney and Walkers' expert Susan Swimley both testified that it was not possible to separate out most of the fees involved in the case. Schraudner testified that, "[a]ll of the witnesses were the same, all of it arose out of the same facts, and in essence Ms. Emmerson and Mr. Johnson worked in consort." (Tr. p.3). Swimley attempted to segregate fees between the claims and after careful review of several boxes of Schraudner's work and the fee invoices, she estimated a fee reduction of $850.00. (Tr. pp. 8-10). Schraudner opined that the only fees that arguably could be attributed solely to Johnson's claims were approximately $3,000. That amount was accepted by the district court. (FOF 9).

Emmerson's expert, attorney Kevin Brown, was unable to separate the time between the Emmerson and the Johnson claims and agreed that a good job was done on the Walkers' behalf and that a good job takes time. (Tr. pp. 21-22). Despite the fact Brown could not segregate the time between the Johnson and Emmerson claims, Brown compared the amount of Walkers'

attorney's fees with Emmerson's attorney's fees, noting a significant difference between the two. (Tr. pp. 16-17). Emmerson used that comparison as a basis for determining the reasonableness of fees. This Court has rejected the "comparison" method in measuring reasonableness. In *Chase,* this Court addressed the problem with that approach:

> Nevertheless, a comparison of the parties' respective expenditures is not necessarily a proper measure of reasonableness. If, due to the nature of the case, one party received significantly more legal services requiring more time and labor for example, by conducting extensive document review-than the other side and prevailed in the end, consideration of the factors would justify awarding fees irrespective of any disparity between the parties' respective expenditures.

Chase, ¶36.

The district court correctly recognized that comparison of opposing lawyer's fees is not an appropriate consideration under *Chase.* (CRR-122, COL 6). The district court found that "for the most part, the work could not be segregated because the claims arise from the same facts, involved the same witnesses and the joint efforts of Emmerson and Johnson." (CRR-122, FOF 6).

In accord with that factual determination, the district court relied upon *Donnes v. Orlando* (1986), 221 Mont. 356, 361, 720 P.2d 233, 237, and *Kadillak v. Montana Department of State Lands* (1982), 198 Mont. 70, 74, 643 P.2d 1178, 1182, holding that "when attorney fees are awarded for one of the issues of the case but the issues are so intertwined that it is impossible to segregate the attorney time between two claims, the attorney may be entitled to the entire fee." (CRR-122, COL 4). This Court recently affirmed the award

of nearly the entire attorney's fee where it was not possible to segregate the litigated claims. *See Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶79, 345 Mont. 125, 191 P.3d 374.

This Court reviews an award of attorney fees for an abuse of discretion which "occurs when the district court acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *JTL Group, Inc. v. New Outlook, LLP*, 2010 MT 1, ¶51, 355 Mont. 1. The district court carefully and properly calculated fees proven to be reasonable by Walkers. Emmerson has failed in her attempt to show an abuse of discretion.

The Walkers are also entitled to their costs and attorneys fees on appeal. "[T]his Court has held that, where an award of attorney fees is based on a contract, the prevailing party is entitled to reasonable attorney fees on appeal." *Eschenbacher v. Anderson*, 2001 MT 206, ¶51, 306 Mont. 321, 34 P.3d 87. Additionally, costs on appeal in civil actions are automatically awarded to the prevailing party. M.R.App.P. 19(3)(a). Walkers are entitled to an award of attorney's fees and costs on appeal in an amount to be determined by the district court.

VIII. THE DISTRICT COURT MISAPPREHENDED THE LAW WHEN IT DISMISSED WALKERS' CLAIM FOR PUNITIVE DAMAGES.

If a plaintiff establishes a traditional contract related tort, such as tortious interference with contract, then the plaintiff may seek punitive damages. *Grenfell v. Anderson*, 2002 MT 225, ¶80, 311 Mont. 385, 56 P.3d 326. To sustain a claim for punitive damages, the plaintiff must establish by clear and

convincing evidence that the defendant is "guilty" of actual fraud or actual malice. *See* Section 27-1-221(1), (5), MCA. *Weter v. Archambault*, 2002 MT 336, ¶40, 313 Mont. 284, 61 P.3d 771.

Section 27-1-221(2), MCA, defines actual malice:

> A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and;
>
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
>
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

Black's Law Dictionary (7th ed. 1999) similarly describes "actual malice." The first definition states: "1. The deliberate intent to commit an injury, as evidenced by external circumstances – Also termed express malice; malice in fact." *Id.*, p. 968. This Court has referred to one who interferes with prospective economic advantage or interferes with contractual relations as a "malicious interloper" in the legal sense and not the popular meaning of the term, the focus being on the intentional acts of the wrongdoer, not his or her ill will. *Maloney v. Home and Investment Center*, 2000 MT 34, ¶42, 298 Mont. 213, 994 P.3d 1124 (affirming an award of $76,149 in punitive damages for tortious interference with the sale of real estate).

The district court in this case ruled from the bench, without briefing or argument, that there was no "malice" for an award of punitive damages. (Tr. p. 310). The district court appears to have misapprehended the law with respective to the legal standards of "malice" in the context of punitive

damages. It appears that the trial court required that Walkers prove malice in the popular sense of spite or ill will rather than in the appropriate legal sense of §27-1-221(2), MCA.

In accord with *Maloney,* and the statutory definition of "malice," the district court's own Findings of Fact clearly establish the requisite actual malice by Johnson's actions. The district court found that;

> Johnson's acts in (a) enticing Emmerson to ignore the Walker/Emmerson exchange agreement by making offers to Emmerson for more money than the Walker exchange agreement; (b) by entering into an exchange agreement with Emmerson; (c) by funding and directing Emmerson to file the complaint against Walkers to invalidate the exchange agreement; (d) by providing legal opinions to Emmerson's lawyer on how to invalidate the Walker/Emmerson exchange agreement (Dec 12 letter to Knuchel); (e) by recommending lawyers to Emmerson to pursue a complaint against the Walkers after Emmerson's lawyer, Josephson and Woodruff maintained the agreement was valid; and (f) by ultimately making available his own lawyer to Emmerson to file this suit ***were intentional and willful*** acts designed to invalidate the Walker Emmerson Land Exchange to the ***detriment of the Walkers. Johnson's actions were done without lawful purpose.*** Johnson was not a party to the Walker/Emmerson exchange agreement but ***deliberately*** interfered with the contract. ***As a result of Johnson's actions, the Walkers have been damaged.***

FOF 15 (emphasis added). The district court's own words mirror the definition of "malice" as required for punitive damages. Johnson had knowledge of the Walker/Emmerson contract and deliberately proceeded through his actions to induce the breach with intentional disregard of and/or indifference to the high probability of injury to the Walkers.

Because the district court by its own findings has already established that Johnson acted with malice in the context of the definition set forth by statute, the district court should have entertained an award of punitive damages. This matter should be remanded to the district court to determine punitive damages in accord with the criteria set forth in 27-1-221(7) MCA.

In calculating an amount of punitive damages the district court should further be directed to consider Johnson's bad faith acts in filing unfounded counterclaims for tortious interference with contract, abuse of process, Rule 11 sanctions and the attendant damage claims against Walkers. Pursuant to 27-1-221(7)(b)(ix), MCA, such "other circumstances" may be considered in determining the amount of punitive damages. *See Maloney,* ¶76; *Czajkowski v. Meyers*, 2007 MT 292, ¶46, 339 Mont. 503, 171 P.3d 94. Johnson is a wealthy sophisticated investor who knew exactly what he was doing when he threatened the Walkers with these meritless counterclaims, asked for punitive damages in the "highest extent permissible by Montana law" (Tr. p.274) and claimed thousands of dollars in damages from the Walkers for the rental of a private jet. Johnson introduced exhibits at trial noting that the cost of rental of the private jet was between $58,543 and $145,004 for the three-day trip.[11] (Johnson Exhs. M and N, Appendices 9, 10). Presentation of those exhibits was designed to further intimidate the Walkers. Johnson knew he wasn't entitled to recover outlandish travel costs, but he let those claims hang over the Walkers for months, only to withdraw them during the trial. (Tr. pp. 274-275).

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[11] The exhibits note the cost of lease of the jet for three days. The trial was originally set for three days, and it is assumed three days was utilized as the time necessary for rental for the trial.

Furthermore Johnson's threat of yet another tortious interference claim against Walkers (Tr. p. 277)[12] and Johnson's innuendo at trial that Ace violated his medical privacy with his statement "that's another issue for another day" (Tr. p. 235) were also designed to continue the ongoing threats and intimidation. Johnson must be held accountable for his actions. Punitive damages are designed to set an example and discourage wrongful behavior. Johnson used the legal process to bully the Walkers. It should be made known to Johnson that the law is not here to serve as a club to beat down those less well off when they don't give him what he wants. As the district court noted, Johnson's attitude, money, and past acts make these threats distressing. (FOF 55). The district court should consider these "other circumstances" in coming to its punitive damage award.

CONCLUSION

For the reasons set forth herein, Walkers respectfully request that this Court;

1. Affirm the District Court's order awarding $75,000 in emotional distress damages to both Rana Rae and Wallace Walker;

2. Affirm the District Court's order awarding attorney fees and costs as set forth in the court's judgment dated July 13, 2009;

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[12] Johnson has threatened a second lawsuit for tortious interference against Walkers regarding Johnson's attempt to purchase State of Montana land. The easement to Emmerson property runs through that state land. Johnson's threats are based on Ace's effort to insure the easement to the Emmerson property was not terminated by a sale of state land to Johnson or anyone else. (Tr. p. 107). Johnson does not have a contract with the state as public lands are put out to bid.

3. Award Walkers their attorney fees and costs incurred for this appeal and direct the district court to hold further proceedings to ascertain the amount of said fees and costs; and

4. Remand to the District Court for a determination of an award of punitive damages against Johnson and in favor of Walkers.

RESPECTFULLY SUBMITTED: March 2, 2010

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CERTIFICATE OF COMPLIANCE

In accordance with the requirements of Rule 11, M.R.App.P., the undersigned certifies the following:

1. All portions of the brief not specifically excluded under Rule 11 are printed with a proportionately spaced typeface of 14 points.

2. The font used is "Times New Roman." The text of the brief is in a roman, non-script text, except for case names and signals.

3. The text of the brief is double-spaced. Footnotes and quoted material are single-spaced.

4. The left-side margin is 1.25 inches; the top, bottom, and right-side margins are 1.0 inch.

5. The word count calculated by Microsoft Word 2004 (Macintosh) is less than 12,400 words, omitting those portions of the brief specifically excluded under Rule 11. A motion has been filed contemporaneously with this brief to file an over-length brief.

DATED: March 2, 2010.

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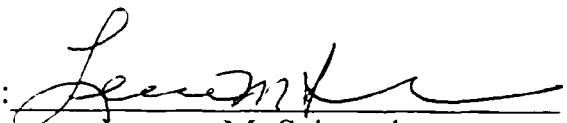
By: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 2, 2010, a true and correct copy of the foregoing Appellee's Brief was duly served on the following by depositing the same in the U.S. mail, postage prepaid, addressed as indicated:

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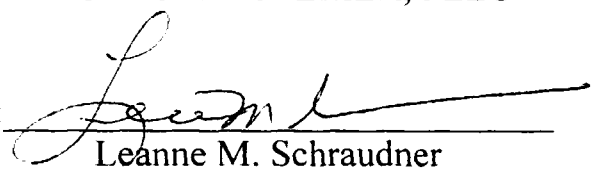
By: 
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